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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS CITY OF CHICAGO, ET AL., IN SUPPORT OF GRANTING A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Reasons for Granting the Writ	3
Argument	4
Conclusion	10

LIST OF AUTHORITIES CITED

Cases

Austin Independent School District v. United States, ... U.S. ....., 97 S.Ct. 517 (1976)	5
Castaneda v. Partida, ... U.S. ....., 45 U.S.L.W. 4303 (3-22-77)	5
General Electric Co. v. Gilbert, ... U.S. ....., 50 L.Ed. 2d 343 (1976)	4
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	7, 9
Hazelwood School District v. United States, No. 76-255, Certiorari granted 45 U.S.L.W. 3463 (Jan. 10, 1977) ..	5
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	6
Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2nd Cir., 1975)	7
Milliken v. Bradley, 418 U.S. 717 (1974)	7

National League of Cities v. Usery, 426 U.S. 833 (1976) 6

Scott v. City of Anniston, ... F.Supp. ....., 45 U.S.L.W. 2488 (N.D. Ala., 3-31-77) 5

Swann v. Charlotte-Mechlenburg Board of Education, 402 U.S. 1 (1971) 7

Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2nd Cir., 1976) 9

Washington v. Davis, 426 U.S. 248 (1976) 5, 6, 9

Constitutional And Statutory Materials

United States Constitution, Art. I, §8 6

United States Constitution, Amend. X 6

United States Constitution, Amend. XIV ..... *passim*

42 U.S.C. §2000e et seq. 4, 7

29 CFR §1607(a) 9

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Respondents City of Chicago, et al., defendants below, respectfully join with petitioners Louis Arado, et al., and pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 411 F.Supp. 218 (1976). The unreported opinion of the United States Court of Appeals for the Seventh Circuit is reproduced as Appendix A to the petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on January 11, 1977. A Petition for Writ of Certiorari was timely filed pursuant to Title 28, United States Code, Section 1254, on April 8, 1977.

This brief in support of the petition for writ of certiorari is filed pursuant to Rule 21(4) of this Court.

QUESTIONS PRESENTED

1. Whether a violation of Title VII of the Civil Rights Act of 1964, can be sustained absent a showing of intentional discrimination in violation of the Fourteenth Amendment.

2. Whether preferential relief may be granted to minorities by the use of employment quotas absent a finding of constitutional violation.

3. Whether an employment test which is shown to be both content valid and concurrently valid is job-related and lawful under Title VII of the Civil Rights Act of 1964.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case is in conflict with the decisions of this Court in *General Electric Co. v. Gilbert*, ... U.S. ..... 50 L. Ed. 2d 343 (1976) and *Washington v. Davis*, 426 U.S. 248 (1976) and raises issues now before this Court in *Hazelwood School District v. United States*, No. 76-255, certiorari granted 45 U.S.L.W. 3463 (January 10, 1977). It presents important questions regarding the use of employment tests by local governmental bodies and the burdens of proof required both to sustain a violation of Title VII of the Civil Rights Act of 1964 against local governments, and to defend against such a charge. Specifically this case raises the issue of whether an employment test given by a local government, which is shown not to be in violation of the Fourteenth Amendment and is shown to have content and concurrent validity, violates Title VII.

This case also raises the propriety of the use of racial quotas under Title VII where no constitutional violation is present, an issue over which the circuit courts of appeal are in conflict.

ARGUMENT

1. The petition for a writ of certiorari raises important issues regarding the standard of proof required in employment discrimination cases brought against local governments pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Specifically this petition raises the question of whether a local governmental unit can be found in violation of Title VII absent proof that the governmental unit was engaged in intentional racial discrimination in violation of the Fourteenth Amendment. The court of appeals held that although the respondents, City of Chicago, et al., had not engaged in intentional racial discrimination in violation of the Fourteenth Amendment, a violation of Title VII was properly shown. This decision should be reviewed by this court in light of the recent decision of *General Electric Co. v. Gilbert*, ... U.S. ..... , 50 L. Ed. 2d 343 (1976).*

In *General Electric Co. v. Gilbert, supra*, this court considered the question of whether an employee disability plan violated Title VII due to the exclusion of pregnancy as a covered benefit. In reaching the decision that the disability plan did not violate Title VII this Court noted that the Civil Rights Act of 1964 did not specifically define the term discrimination. The court stated that in a determination of discrimination under Title VII "we should not readily infer that it meant something different than what the concept of dis-

* The court of appeals remanded to the district court allegations of sex discrimination raised by plaintiffs on the apparent belief that under *Gilbert* intent is a necessary requirement in sex discrimination cases brought under Title VII. This raises the anomaly of requiring different standards of proof under Title VII in cases alleging sex discrimination as against those cases alleging racial discrimination.

crimination has traditionally meant" under the Fourteenth Amendment. 50 L. Ed. 2d at 360. Thus this Court appears to be saying that the standard of proof required to prove discrimination in a Title VII action is identical to the traditional standard of proving discrimination under the Fourteenth Amendment and, as the decision in *Washington v. Davis*, 426 U.S. 248 (1976), held, a finding that an employment practice results in an adverse racial impact is not sufficient to support a constitutional violation absent a showing of intentional discrimination.

It therefore follows that proof of intentional discrimination is a prerequisite to any finding of a Title VII violation. A recent decision by the district court for the Northern District of Alabama, *Scott v. City of Anniston*, ... F. Supp. ..... .45 U.S.L.W. 2488 (N.D. Ala., 3/31/77), has so held, and this same issue is now before this court in *Hazelwood School District v. United States*, No. 76-255, certiorari granted 45 U.S.L.W. 3463 (January 10, 1977.)

Proof of intentional discrimination should also be required in cases, like the present situation, where plaintiffs' evidence consists solely of the disparity in pass/fail rates on one examination. As this Court noted in *Castaneda v. Partida*, ... U.S. ....., 45 U.S.L.W. 4303 (March 22, 1977) at note 8, statistics showing a racial impact are relevant only if taken over a period of time sufficient to test their reliability. In any one sampling, or any one examination, it is possible and indeed expected that statistical deviations will occur. Such a deviation was held to be insufficent to prove discrimination in *Washington v. Davis*. It is for this reason that plaintiffs must be required to show intentional discrimination. To this effect the Solicitor General, speaking for the United States in *Austin Independent School District v. United States*, ... U.S. ....., 97 S.Ct. 517 (1976), argued that racial disparity in school assign-

ments did not violate the constitution absent a showing that the statistical disparity was caused by state action, presumably requiring some showing of intent.

In addition to this Court's decision in *Gilbert*, it appears that as a matter of federalism under the Tenth Amendment it is necessary for a plaintiff bringing a Title VII action against a governmental unit to prove intentional discrimination. The Civil Rights Act of 1964 was adopted pursuant to the commerce power of Article I, Section 8, of the Constitution. *Heart of Atlanta Motel Inc., v. United States*, 379 U.S. 241 (1964). In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this court held that Congress could not use the commerce power to extend federal control over the terms and conditions on which state and local governments hire, promote, and compensate their employees. Such a federal intrusion would violate the Tenth Amendment. It therefore follows that Congress could not use the commerce power to extend Title VII to local governments. The extension to local governments can only be possible under Section 5 of the Fourteenth Amendment.

Therefore, if Title VII's jurisdiction over the respondents, City of Chicago, et al., in the district court was based on the Fourteenth Amendment the plaintiffs were required, under *Washington v. Davis, supra*, to prove intentional discrimination. The court of appeals decision, decided without reference to *Gilbert*,* should be reviewed by this court to determine these important issues.

2. The district court ordered, and the court of appeals affirmed, the use of preferential hiring quotas for employment in the Chicago police department and authorized the withholding of 114 million dollars in

* Circuit Judge Pell in dissent noted, without further comment, that the decision in *Gilbert* should have been applied by the court of appeals in review of the district court's findings.

revenue sharing funds as a method to enforce compliance with these quotas. Quota relief requires that race be made a factor in hiring decisions for the position of police patrol officer and police sergeant and thus violates the provisions of Title VII of the Civil Rights Act of 1964, as well as the provisions of the Fourteenth Amendment. The circuits are split as to the constitutionality of such relief.

Title VII specifically states that the statute does not authorize preferential relief to any group or person based on race or national origin. 42 U.S.C. § 2000e(6). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this court held that the provisions of Title VII do

> "not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 430, 431.

Race-specific relief was first authorized by this court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) where such relief was found to be within the discretionary powers of a court. However this Court specifically stated that "absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16. This holding was restated in *Milliken v. Bradley*, 418 U.S. 717 (1974), where the Court held that federal remedial power may be exercised "only on the basis of a constitutional violation."

One circuit has rejected the use of quotas as relief in cases brought against public employers for alleged employment discrimination. The Second Circuit in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975), held that the use of quotas for public employment was unlawful reverse

discrimination that violated the Fourteenth Amendment. The *Kirkland* court stated that quota relief would be improper even if a constitutional violation were proven.

The court of appeals' judgment here authorizes the use of race-specific relief absent a finding of constitutional violation. This holding violates the clear language of Title VII and the holding of this Court in *Swann*.

The petition for certiorari at page ten indicates the conflict among the circuits as to the use of quotas in Title VII cases. At least seven circuits approve of such relief. This Court should grant certiorari to determine if such preferential race-specific relief is allowable under either Title VII or the Constitution, an issue currently before this Court in *Regents, University of California v. Bakke*.

3. This case raises an important question regarding the nature of proof required by a defendant to show that an employment examination is job-related. In the present case, the 1973 police sergeant's examination was shown to be both content valid*, i.e., the examination consisted of questions inquiring into the essential knowledge required by the job being tested for, and concurrently valid. The district court as well as the court of appeals rejected these forms of validation because they do not lend themselves to a statistical correlation with job performance. This issue becomes whether the Civil Rights Act of 1964 or the Constitution requires all employment examinations to be validated by a predictive study.

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* The petition for certiorari uses the term construct validity for this method of validation. However, from the argument in the petition it is clear that petitioners rely on the content validity of the 1973 examination.

The Civil Rights Act of 1964 requires that employment tests be job-related. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Equal Employment Opportunity Commission has established testing guidelines which state that employment examinations should be validated by the use of other predictive or concurrent validation techniques. 29 C.F.R. § 1607.5(b). However, in *Washington v. Davis, supra*, this Court recognized that no one specific method of validation is required under the Civil Rights Act and that a relationship between test scores and training was sufficient proof of job-relatedness despite disapproval of this validation method by the E.E.O.C. guidelines. Content validation itself has been accepted by the Second Circuit as an acceptable method of showing that an examination is job-related. *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2nd Cir., 1973).

In addition, the sergeant's examination was shown to be concurrently valid. This validation was accomplished by giving the examination to incumbent police sergeants and statistically correlating their test scores to their performance on the job. The statistical correlations showed that a statistically significant relationship existed between candidate test scores and their job performance. These statistics were unrebutted. Three expert witnesses stated that these correlations were sufficient proof that the 1973 sergeant's examination was job-related.

The court of appeal's requirement that job-relatedness be shown only by proof that the examination predicts actual job performance places upon a defendant a burden of proof far beyond that required under this Court's holding in *Davis*. It requires that a public employer ignore valid test scores and enter into long range predictive validity studies. Such a practice would

not only destroy the civil service requirements of competitive examination but also compromise the safety of the public during the study period as persons possibly unfit for police work are hired solely for purposes of a validation study. For this reason review of this decision is necessary to provide defendants with guidance as to the proper method to use regarding proof of the job-relatedness of employment examinations.

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and for the reasons stated above, it is respectfully requested that this court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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